BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is not yet reported but is part of the proceedings certified to this Court.

Statement of Jurisdiction.

A statement of the grounds upon which the jurisdiction of the Court is invoked appears in the Petition herein, page 3.

Statement of the Case.

Facts.

Petitioner, Superior Tanning Company, is a tannery (processing hides into leather), at Chicago, Illinois, founded over thirty years ago by three Katz brothers. Solomon Katz and William Katz, sons, have carried on in the places of their respective fathers who died (Rp. A. 127, 213).[2] The

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[2]In accordance with Rule 35 (4) of the Circuit Court of Appeals for the Seventh Circuit the complete record is *not* printed, but each party prints as a separate Appendix to his brief, such parts of the record material to the issues that he desires the Court to read. Hence the record as printed below appears in the Board's appendix and Respondent's (Petitioner before this Court) Appendix, and together with the proceedings in the Circuit Court of Appeals is presented here in accordance with Rule 38 (7) of this Court as "the record as printed below."

Respondent's Appendix includes material testimony omitted from the Board's Appendix, and also the testimony relied on by the Board so as to aid the court in finding *all* testimony on either side in one place in chronological order, with context and setting preserved.

References are as follows:

"B. A." refers to Board's Appendix.

"Rp. A." refers to Respondent's Appendix.

All italics herein are supplied, except where otherwise specially noted.

third brother, Mayer Katz, was still living at the time of the hearing. All of them have worked alongside their employees (Rp. A. 236).

Petitioner never had any labor difficulties, a majority of its employees never belonged to any union and no demand for union recognition or collective bargaining was ever made on petitioner (Rp. A. 215).

May 20, 1937, was the 30th anniversary of the founding of the business of petitioner (Rp. A. 156). Petitioner's officers were vitally concerned about the reign of terror of sit-down strikes throughout the country at that time (Rp. A. 157, 216) and possible loss of hundreds of thousands of dollars to hides in process (B. A. 32).

Petitioner consulted with Lewis F. Jacobson, its regular counsel. He suggested that the way to find out if the employees were satisfied was to talk to them and suggested calling a meeting to discuss any mutual problems (B. A. 46; Rp. A. 158).

Whereupon, on the morning of May 20, 1937, the officers of petitioner and Mr. Jacobson met with approximately thirty of the employees (who were a cross section picked at random from each department), and who petitioner thought would be willing to offer suggestions or criticisms (Rp. A. 158; B. A. 16).

The meeting lasted about one hour, during which time suggestions were presented regarding wages, seniority rights, vacation or bonuses and steady employment (Rp. A. 159), and the idea of incorporating them into an individual contract for each individual employee's consideration was proposed. A one page form of individual contract was drafted by Mr. Jacobson and sent to the printer (Rp. A. 158, 173, 174). A meeting of all the employees was called for that afternoon, at which meeting Mr. Jacobson spoke to them (Rp. A. 160). There is a sharp conflict among the Board's witnesses as to parts of the speech (B. A. 49).

There is no conflict that Mr. Jacobson informed the employees that it was the 30th anniversary of the Company; that there had always been a friendly relationship with the employees, although there may have been labor strife all over the country; that employees and petitioner were all a big family, each member having responsibilities, and that there was a lot of unrest in the country with sit-down strikes (Rp. A. 52, 160, 199, 231).

Petitioner's evidence, which is corroborated by some of the Board's witnesses, established that the employees were told that they were free to do anything they wanted to do; that they were free to join or not to join any labor organization (Rp. A. 92, 250); that there were good unions, run by outstanding men like Green and Lewis (Rp. A. 87, 117, 161, 185, 232); that there were some bad unions which were run as rackets by men like Al Capone (Rp. A. 160, 185, 232); that the employees were told the company was offering to them an individual contract which they could sign or not sign, as they saw fit (Rp. A. 92, 185, 216, 249); that they could sign the individual contract and still belong to any union (Rp. A. 87, 93, 94, 113, 161, 185, 250).

The individual contract was read by Mr. Jacobson to the meeting, section by section (Rp. A. 56, 69, 198, 216). After Mr. Jacobson's speech, the employees were invited to speak (Rp. A. 21, 161, 216). Albert Villastriga, the union secretary, spoke and announced a union meeting for that evening and the employees were told then and there by Mr. Jacobson that they were "free to go and to listen to any union speaker" (Rp. A. 161, 162, 250).

The contract in no way interfered with any of the employees' rights under the Act, *i. e.*, to join any organization, to engage in union activity, to select any representative of the employees' own choosing, or to ask for a collective bargain. For convenience of the Court, we insert on the opposite page a copy of the contract in its exact size (B. A. 53; R. 715).

EMPLOYMENT CONTRACT

Between SUPERIOR TANNING COMPANY, and .....
..... Employee.

To promote steady employment at the highest and fairest wages, to maintain harmony and to prevent strikes and labor troubles for the worker or management, it is agreed:

1. STEADY EMPLOYMENT. The Company has provided steady employment for over 30 years, during wars, panics, depressions and prosperity, and the Company hereby employs the above named Employee, on the same basis of steady employment, to do the work now or hereafter assigned to him in the *finishing* department, and he hereby agrees to perform such work efficiently and properly.

2. WAGES. The Company shall pay and the Employee shall receive wages for each hour worked, payable on each Tuesday for the immediately previous calendar week, at the rate of wages per hour as increased on March 27, 1937.

3. GUARANTEE OF FURTHER INCREASES IN WAGES. The Company has for thirty years been in the front rank in raising and paying the highest wages which its business and competition has permitted, and desires to continue to do so in the future. Therefore, whenever during the life of this contract the rate of wages per hour for the same kind of work shall be increased by a majority of other tanneries in Chicago, over the rates paid this Employee, the Company agrees immediately to raise such rate of wages to equal such increased rate. The Company agrees to pay as high wages per hour as may be generally paid in other leading tanneries in Chicago for like work.

4. FURTHER INCREASES IN WAGES. The Company further agrees to reserve the right to increase wages of the Employee in the event:

(a) That there shall be a general increase of wages in the plant;
(b) That the business of the Company shall improve;
(c) To recognize special merit or efficiency of the employee.

5. NO REDUCTION IN RATE OF PAY. During the life of this contract, the rate of pay shall not be reduced.

6. BONUS AND VACATIONS. At Christmas time in each year, the Company shall pay a bonus to the Employee who has worked continuously for at least one year, a sum equal to one week's wages, as a bonus, or, in lieu thereof, such employee shall be entitled to one week's vacation, with pay, at a time agreed upon; and if he or she shall have worked continuously for at least six months and less than one year, then he or she shall be entitled to half such bonus or vacation.

7. PREFERENCE AND SENIORITY. In all cases of temporary lay off for any reason, the Company shall give preference to the Employee in reemployment, and to all others similarly situated, before any new help is employed for the same work. The Company may stagger available work on a fair and proportionate basis before employing new help for such work. (DISCHARGE) The Company may discharge only for such reasonable and proper causes as are common and lawfully grounds therefor including inefficiency, insubordination or violation of rules of safety or plant regulations.

8. ADJUSTMENTS. The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects.....
..... as his representative and arbitrator, and the Company will select its representative, and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer.

9. TERMINATION. Nothing herein shall prevent the Employee from terminating this contract at any time on first giving two weeks' written notice to the Company, of his intention so to do. This contract shall remain in full force and effect until December 31, 1937, and then may be renewed by mutual consent from year to year thereafter only upon such terms as may be entirely satisfactory to the Employee and the Company.

DATED May 25, 1937.

SUPERIOR TANNING COMPANY

By .....

William Katz

.....
Employer

.....
Employee

After the meeting the individual contracts were passed out to the employees (Rp. A. 164). The place in the contract for the appointment by the employee of his arbitrator for the purpose of adjusting grievances and disputes under the contract, was left blank (B. A. 18; Rp. A. 16, 17). The employees were completely free to insert the name of whomsoever they desired; petitioner made no suggestions whatever (Rp. A. 16, 17, 164, 176, 180). Many of the employees did not sign the contract immediately (Rp. A. 45, 59). Some of the Board's witnesses who were members of the Union, took the contract home and discussed it with their families before signing it, the following day (Rp. A. 88, 106). Some contracts were signed later and after the union meeting held that night. A total of 269 out of 271 employees signed such contracts. Two of the employees, including Albert Villastriga, the union secretary, did not sign a contract, and were in no way at any time ever discriminated against or criticized, but on the contrary, received all the benefits of the individual contract (Rp. A. 255, 256, 267).

The 1937 individual contract expired by its terms on December 31, 1937. According to the Board's own witness on this subject, who was a member of the Union, he and all the employees were satisfied with the contract (Rp. A. 107).

In January, 1938, petitioner offered its employees individual contracts for the year 1938 (in substantially the same form as the 1937 individual contract), which, by their terms, expired December 31, 1938 (Rp. A. 180).

Petitioner at no time ever asserted that the arbitration provision of the individual contracts prevented collective bargaining or prevented any employee from selecting any person or organization as a representative of such worker for any purpose (Rp. A. 183, 193, 231).

The Complaining Union.

In 1935, two years before the acts complained of, a Rudolph Burkey, never employed by petitioner, organized Local 79 of the National Leather Workers Association and obtained a charter from the American Federation of Labor. In March, 1937, this organization stopped its dues to the American Federation of Labor and Mr. Burkey conducted the "Tannery Workers Organizing Committee." In October, 1937, Mr. Burkey received a charter for the National Leather Workers Association, Local 43, from the Committee for Industrial Organization. In February, 1938, at the time of the hearing, Mr. Burkey held charters from both the American Federation of Labor and the Committee for Industrial Organization (Rp. A. 120 to 122).

Procedural Steps.

Upon the fourth amended charge filed on February 5, 1938, by the National Leather Workers Association, Local 43, (herein called the Union), the Board, on February 7, 1938, issued its Complaint against petitioner alleging that it had engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the National Labor Relations Act (B. A. 5, 41). The Complaint in substance alleged that petitioner violated Section 8(1) by advising, urging and threatening its employees against membership in the Union, by questioning them concerning their Union activity, and by soliciting them to sign individual contracts of employment (B. A. 5). The Complaint further alleged that petitioner violated Sections 8(1) and 8(3) by discharging seven employees because of Union membership and activity (B. A. 5). On February 13, 1938, petitioner filed an answer denying that it violated the Act in any manner (B. A. 6).

The hearing was held from February 14 to 17, 1938. On April 15, 1938, the Trial Examiner filed an Intermediate

Report, in which he found that petitioner's attorney in his speech to employees at an afternoon meeting of May 20, 1937, (1) "was antagonistic toward unions" (B. A. 17), and (2) that "Jacobson's speech and the foisting of the contracts in question on the employees were clear violations of the Act" (B. A. 18).

The Trial Examiner also found that all the alleged discharges were made for proper cause (B. A. 19) and recommended that petitioner post notices that the 1937 and 1938 individual contracts were in violation of the Act and would no longer be solicited or in force (B. A. 25). Nothing was recommended as to any individual contracts of employment in the future (B. A. 25).

On August 23, 1939, the Board rendered its Decision and Order, finding that petitioner had violated Section 8(1) of the Act by warning its employees against the Union, by questioning them concerning their Union activity, and by inducing them to sign individual contracts of employment (B. A. 41, 60).

On August 15, 1940, the Board filed a petition for enforcement of its Order, in the Circuit Court of Appeals, for the Seventh Circuit. On January 21, 1941, the Circuit Court of Appeals, after denying petitioner's petition for rehearing, on January 15, 1941, entered its decree pursuant to its decision of December 14, 1940.

The decree, subject to minor modifications, enforced the order of the Board. The sections of the decree herein complained of required that petitioner:

> "(1) Cease and desist from: * * * (c) Giving effect to the individual contracts of employment in the form noted in the Board's finding of fact, *or to any modification, continuation, extension or renewal thereof, or to any similar form of contract for any period subsequent to December 31, 1938.*"

Errors Relied Upon.

(1) Petitioner assigns as error, the holding by the Circuit Court of Appeals for the Seventh Circuit that: (a) the National Labor Relations Board has jurisdiction over written individual contracts whose terms do not deprive employees of their right to collective bargaining or self-organization; (b) the Board has jurisdiction and power to prohibit an employer in perpetuity from entering into written individual contracts, to take effect *in futuro;* (c) an arbitration clause of an individual contract limited to adjustment of disputes arising under the individual contract is invalid; (d) an employer does not have the right to express his opinion in a speech to his employees on the subject of labor relations even though the statements made by the employer are true and the employer makes no threats of economic reprisals; (e) the employer does not have the right to express his opinion of labor organizations at a time when a union is conducting an organizational campaign among his employees.

(2) Such holdings of the Circuit Court of Appeals are: (a) violative of the First and Fourteenth Amendments of the Constitution of the United States, and (b) are not the proper construction of the intention of Congress or the language used in Sections 7 and 8(1) of the National Labor Relations Act.

ARGUMENT.

I.

An employer has the right to enter into individual contracts with his employees if the terms of such contracts do not deprive the employees of their rights to collective bargaining or self organization.

The Circuit Court of Appeals in this case by perpetually enjoining petitioner from giving effect to individual contracts immediately raises the questions of:

(a) the extent which the Fourteenth Amendment of the Constitution of the United States guaranteeing the right to contract, prohibits Congress from interfering with an employer's right to individually contract with his employees;

(b) the extent to which Congress has or may exercise this power of interference, if any, and

(c) the delegation of such power by Congress, if any, to the National Labor Relations Board by providing in Sections 7 and 8 (1) of the Act:

> "It shall be an unfair labor practice for an employer (a) to interfere with, restrain or coerce employees in the rights * * * ['to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.']"

This Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, was called upon to con-

sider the constitutionality of the National Labor Relations Act. In answer, at that time, to the contention that the Act was unconstitutional because it interfered with the right of individual contract, this Court said, at page 45:

> "It was taken 'to prohibit the negotiation of (collective) labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, *'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.'* We think this construction also applies to Section 9 (a) of the National Labor Relations Act.
>
> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. *It does not prevent the employer* 'from refusing to make a collective contract and *hiring individuals on whatever terms' the employer 'may by unilateral action determine.'* The Act expressly provides in Section 9 (a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

There hardly seems room for any doubt of this Court's admonition that Congress *did not* and *could not* have delegated any authority to the Board to interfere with individual contracts whose terms do not interfere with collective bargaining. In considering this precise question, it has been said recently: "Close analysis of the Court's decision (*Jones and Laughlin* case) seems to indicate * * * that the Court was speaking of exactly that situation, and the Court certainly seems to hold that individual bargaining is an alternative. The Board's best, indeed, the Board's only argument, therefore must ignore the Supreme Court's pronouncement * * * *the policy of almost any statute could be more conveniently attained by ignoring the limitations*

imposed by the due process clause." Chester Ward, "*The Mechanics of Collective Bargaining,*" 53 Harvard Law Review, 754, 790, (March 1940).

The right of an employer to enter into individual contracts is just as fundamental and entitled to the same respect as the obligation of employers to recognize either national labor organizations or independent inside unions representing a majority of its employees, and to collectively bargain. In *National Labor Relations Board* v. *Sterling Electric Motors, Inc.,* 109 F. (2d) 194 (C. C. A. 9) the Court considered this question. The Court having previously referred to (a) dealing with international unions, and (b) independent "inside" unions, then said at page 202:

> "The third *alternative* for the small plant seems almost ignored in the titanic struggle for power of nation-wide internationals and associations, though the right to choose it is as worthy of the consideration of courts and legislatures as either of the other two. That is the right not to join or create or assist any labor organization at all but to deal individually with the employee. * * *
>
> "In a proceeding seeking to destroy a labor organization, we do not interpret the intent of Congress in enacting the Labor Board legislation to have established any presumption that employees are always to be deemed to be aiding a violation of the Act if they prefer no organization and decline to create one.
>
> "Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board."

The right to contract is a sacred guaranteed right and one of the cornerstones of our democracy. The right

to contract for labor is as much a property right as anything else.

> "It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of Article 2 of the constitution of Illinois. * * * It is equally a violation of the fifth and fourteenth amendments of the constitution of the United States. * * *" *O'Brien* v. *The People,* 216 Ill. 354, 374.

It is significant to note that the National Labor Relations Act does not contain the word "influence." An examination of the hearings before the Senate Committee considering the National Labor Relations Act discloses that the word "influence" was *purposely* excluded from Section 8 (1) of the National Labor Relations Act. H. Rep. 1147, 74th Cong., 1st Sess. (1935); S. Rep. 573, 74th Cong., 1st Sess. (1935).

It is apparent that Congress in using the words "interfere," "restrain" or "coerce" (with the right to collectively bargain) must have meant such words in the normal meaning of those words, rather than in the sense of "influence" which might be prohibitive of the right of individual contract or expression of opinion, as the Circuit Court of Appeals in this case has chosen to interpret the meaning of Section 8(1).

Obviously an individual contract providing for the highest wages and best working conditions may interfere in the sence of *influencing* an employee's choice, if that employee believes that his individual contract offers him all the benefits possible to obtain from his employer.

The Circuit Court of Appeals for the Seventh Circuit, refused to distinguish between the two entirely different fact situations of an individual contract (which does not contain illegal terms prohibiting collective bargaining) and a collective bargaining contract. The Circuit Court of Appeals relied on the following cases: *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2nd) 984 (C. C. A. 7); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9); *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2nd) 29 (Ct. App. D. C.).

The contracts in those cases were all collective bargaining contracts with "closed shop" agreements, and hence they forestalled any other collective bargaining rights by the employees. In the absence of the National Labor Relations Act, these contracts would have been illegal due to the "closed shop" provision. In those contracts the collective bargaining contracts failed to come under the protection of the "closed shop clauses" granted by Section 8 (3) of the Act. They were not negotiated with an undominated labor organization.

In the case at bar, there was never any refusal to collectively bargain and the individual contracts did not deprive employees of the "safety valve" of collective bargaining for their mutual aid and protection, should the employees desire such method of bargaining (Rp. A. 215). In fact, in the case at bar many of the employees had both their individual contract and membership in the complaining Union without any interference (Rp. A. 88, 106, 183, 193, 231).

An attempt to analogize an individual contract with a collective bargaining contract or a company dominated union situation is just adroit casuistry.

In the latter situations *domination* of the bargaining agency is the vital issue. When individual contracts are involved—they are a unilateral act by the employer—there is no question of domination or sponsorship. Obviously an employer dominates and sponsors an individual contract. If none of the *terms* of the individual contract interferes with employees' rights under the Act, then by definition, his rights are not impaired by the individual contract.

Nevertheless, the Circuit Court of Appeals in voiding these individual contracts relies to a great extent on the "finding" that "supervisors and officials exerted considerable pressure to obtain employees' signatures to the contracts" by such statements as "hurry up sign the contract."

Assuming *arguendo* that such was the case what were the employees "coerced" to sign or do? It is not the case of "coercing" them to sign an application card for a union or to accept a particular collective bargaining agency —precluding any other.

It would be no different than if the employer "coerced" an employee to sign a contract of group life insurance or hospital insurance, or even an application blank in a political party. The right protected by Section 8 (1) of the Act to collectively bargain is still preserved.

However, the Circuit Court of Appeals, in its opinion, states:

> "Respondent has never contended, nor does the evidence show, that the morning meeting was considered by respondent 'as collective bargaining by or with persons who even claim to be acting as representatives.' Perhaps counsel is sound in the conclusion just expressed, but even so, we fail to see that great consequence attaches thereto."

The Circuit Court of Appeals in its opinion states that no distinction can be made on the question of jurisdiction between individual:

> "(1) Contracts whose terms *per se* violate the Act, and
>
> (2) Contracts whose terms are fair on their face but which, in their history, execution and existence, are tainted by employer, condemned by the Act, * * *."
>
> "Counsel for respondent contends that the *National Licorice Co.* case is only authority for case relating to (1). No doubt, counsel is correct to the extent that certain language in the opinion is really not necessary to the decision of the case. However, * * * we think it is the law that contracts in Class (2) may be appropriate subjects for the affirmative remedial action of the Board."

What then is left, it should be asked, of the guarantees of the Constitution and our Democracy if Congress did—or could delegate to an administrative body such power to intermeddle with individual contracts containing no illegal terms.

This Court in the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, considered a totally different contract and a totally different situation than that presented in this case.

In the *National Licorice* case, the contracts contained provisions expressly forbidden in the Act, namely (a) benefits of the contract were limited only to signers; (b) signers relinquished the right to strike; (c) the right to demand a closed shop, or (d) the right to demand a signed agreement with any union, and (e) refusal to mediate or arbitrate the propriety of a discharge. The contracts in the *National Licorice* case were not individual contracts at all, but were

contracts negotiated with a company dominated union, and actually a collective bargaining contract and asserted as a bar to the complaining union demands for union recognition and undominated collective bargaining. There are no such facts in the case at bar.

The Circuit Court of Appeals for the Ninth Circuit has so construed the *National Licorice* case and is in direct conflict with the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case at bar. In *National Labor Relations Board* v. *Sterling Motors, Inc.*, 112 F. (2d) 63, (C. C. A. 9) the Court at page 68 said:

> "The Board cites as determining the congressional intent to create the absolute power claimed here, the case of *National Labor Relations Board* v. *National Licorice Co.*, ... U. S. ..... 84 L. Ed. 533. The report of that case shows no counsel representing the employees or the union. As we read the opinion the petition for certiorari raised no question of the disestablishment of the union. *The case involves the individual contracts of employees with the employer which on their face showed agreements in violation of the Act.*"

The decision of the Circuit Court of Appeals for the Seventh Circuit in the case at bar is also in conflict with a decision of the Fifth Circuit Court of Appeals.

In *P & O Steamship Co.* v. *National Labor Relations Board*, 98 Fed. (2d) 411 (C. C. A. 5), the Court held that the Act does not prohibit contracts with individual employees. An emergency existed on account of sit-down strikes and sabotage. The individual contracts were made while the Board was unable to determine as to who the bargaining agency was, and the Court decided that the Company was not guilty of a violation of the Act and need not wait for the Board to make up its mind.

II.

An arbitration clause per se does not violate the National Labor Relations Act.

The Circuit Court of Appeals' opinion states:

> "The individual contracts signed by the employees contained the following provision for the 'adjustment' of disputes; '*Adjustments.* —the Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects .... as his representative and arbitrator, and the Company will select its representative, and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third arbitrator, which three shall promptly hear, adjust and arbitrate. * * * The decision of a majority of such Board to be final. * * *' "

The Circuit Court of Appeals concludes

> "that the adjustments or arbitration clause found in all these contracts, in itself, violates the Act in that it has the obvious effect of restraining the employees in the exercise of their rights under Section 7 of the Act. It is unnecessary to say more in this connection inasmuch as our conclusion does not add materially to the result already reached."

This view of the Circuit Court of Appeals directly conflicts with the decisions of the Ninth and Third Circuit Courts of Appeal.

In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9), the Court said at page 164:

"The above quoted finding indicates that the Board followed the position asserted by the Attorney for the Union to the effect that an employer under the circumstances was deprived of any right to make any settlement of a grievance directly with an employee.

"This was not a correct interpretation either of the agreement or the law.

"Section 9 (a) of the Act contains the proviso that 'any individual employee or group of employees shall have the right at any time to present grievances to their employers.' *Thus the Act does not inhibit adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining* in matters affecting employees as a class. This view finds support in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1."

Even in fact situations where there was obstruction of collective bargaining rights, the other Circuit Courts of Appeals have refused to interfere. In *National Labor Relations Board* v. *Delaware-New Jersey Ferry Company*, 90 F. (2d) 520 (C. C. A. 3), cert. den. 302 U. S. 738, the striking employees negotiated a settlement directly with their employer, notwithstanding the Board ordered the employer to cease and desist from refusing to bargain collectively. That Court in dismissing a petition of the Board for an order of enforcement, said at page 520:

"All which is left to this case is the abstract question of the right of a labor union official to negotiate. * * * The engineers have disposed of any controversy there may have been by, themselves unanimously making a contract on terms suitable to them with the employer. This contract is for a year ahead. There is in consequence nothing to negotiate. * * * This agree-

> ment has already been made, and, as we have said, is entirely suitable to the employees concerned, each of whom has made the contract agreed upon. In view of this we see no need for the intervention of this or any other Court. *To make the order asked of us might defeat the very purpose of the Act of Congress by creating an occasion for strife which otherwise would not exist.*"

The arbitration clause is optional with employee to adjust any dispute himself or select an arbitrator. No "prohibitive" construction was placed upon the clause by the parties. It was never asserted as a bar to the Board's complaint in this case involving seven alleged discharges. It is not a *must* or *prohibitive* clause. On the contrary, the clause is one for the employees' benefit—not the employer's. The clause involved in the case of *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, was entirely different. This Court did not strike down that clause because it was an arbitration clause but because it *expressly* excluded any arbitration in the event of discharge, or review by the Board as to discriminatory discharge or negotiations by any labor union. In other words, it gave the employer the absolute right to discharge while the Act limits this right. Hence that clause violated the Act.

The phrase in the individual contract at bar merely codifies what every fair minded employer will try to do in the first instance—"adjust with the employee all disputes, by negotiation, if possible." The proof is in the record as to the operation of this clause. Petitioner negotiated any complaint presented to it (Rp. A. 192). There is no evidence that petitioner in any manner ever attempted to use the individual contracts as a bar to collective bargaining.

It is significant to note that the Board in its Charge, Complaint, Trial Examiner's Report and Decision did not

complain that this clause or any of the terms of this individual contract violated the Act.

The Trial Examiner observed without criticism "* * * the said contract also contained an arbitration clause providing a blank space for the insertion of the employee of his representative and arbitrator for the settlement of grievances and disputes." (B. A. 18.)

The question of the validity of the individual contracts, their execution or operation was, to say the most, only vaguely presented in the complaint (B. A. 5). Trial Examiner Bokat: "* * * whether these men were discharged or discriminated against because of union activity or not. I think that is the entire issue in the case" (Rp. A. 123).

The Board found that the record did not indicate "how many" or "how" these representatives and arbitrators in the contracts of 1937, 1938, *et seq.*, were designated (B. A. 54). The Board did not think it important at the time of the hearing. The Board's trial attorney *objected to such evidence as being irrelevant and immaterial* and the Trial Examiner sustained this objection (Rp. A. 16). Respondent preserved its exception (Rp. A. 126).

Nevertheless, the Court in concluding that the arbitration clause invalidated the individual contract apparently places great weight on who was or was not designated as the employee's "arbitrator" and inference as to why or why not any union was there designated, absolutely without any evidence in the record. No such issue was tried, due to the Trial Examiner's ruling.

Instead of being criticized and subject to great expense and harassment by the Board, an employer should be commended for being willing to reduce to written terms its employment relationship with its individual employees. *Heinz Co.* v. *National Labor Relations Board*, 85 L. Ed. 303, decided January 6, 1941.

The individual contract leaves the employee perfectly free to join any labor organization. The Board's union witnesses had done just that and none resigned. It is a contract which can be terminated by the employee at any time by prior notice. It is a contract which permits the employee to name himself or anyone as his arbitrator for the adjustment of grievances and disputes under that particular contract. He is free to do anything he chooses regarding collective bargaining. It is a contract which by its very terms accomplishes for the employee, employer and society the primary stated purpose of the Act, namely, the avoidance of "industrial strife or unrest" which would "burden or obstruct commerce" through strikes; at the same time it guarantees the employee against any "diminution of employment and wages." The contract still leaves the way perfectly clear for employees to join unions and engage in concerted activities at any and all times for any and every purpose.

III.

A perpetual injunction against an employer executing individual contracts deprives the employer and his present and future employees of their constitutional rights.

The decree of the Circuit Court of Appeals prohibits "*any modification, continuation, extension or renewal thereof or to any similar form of contract for any period subsequent to December 31, 1938.*" These words are so broad and general that, it is respectfully submitted, they are not only confusing and indefinite, and leave petitioner's future required action uncertain; but also deprive petitioner and its employees of their constitutional right to contract.

The order enforced prohibits the making of "any similar contract" in the future. In effect this prohibition denies this employer any right to make any contract with any of

these employees now or at any time. It is not perceived that any contract can be conceived of, which is not similar, in that every such contract must contain the names of the parties, the hours of employment and the wages and description of the character of the work to be performed, the period of time for which it is effective, vacation provisions, if any, and the like. These are terms which enter into any contract, and although no fault as to any provision of the instant contract is found, except as to the question of arbitration, if any, not only these but any future similar contracts are forbidden. It would seem therefore that petitioner is forbidden from having any contractual relations whatsoever with its employees.

Even in those instances where the Board has the express right to exercise its jurisdiction over collective bargaining contracts no court ever prohibited any employer from *at any time* in the future negotiating *any* closed shop agreement.

The decree attempts to engage in speculation entirely outside of, and unwarranted by the record as to what happened, or did not happen, or may happen subsequent to December 31, 1938.

In effect, the perpetual injunction in this case is no difference from the *previous* censorship of the exercise of the right of free speech condemned as a violation of the Fourteenth Amendment by this Court in *Schneider* v. *State*, 308 U. S. 147. In *Patterson* v. *Colorado*, 205 U. S. 454, this Court said, at page 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697, 714.

IV.

An employer has a constitutional right to express his opinion to his employees on the subject of unions.

In *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, this Court did not decide that the meetings there held between the employer and its employees, or the speech then made, was an unfair labor practice or was any reason for reflecting upon the validity of the individual contracts. Yet, in effect, this is the substance of the Circuit Court of Appeals' opinion.

While it is true that the decree enforcing the order of the Board does not prohibit petitioner from speaking to its employees, the Circuit Court of Appeals, as a practical matter, is denying that petitioner ever had any such right of free speech by calling the subsequent act—offer of the individual contract—an unfair labor practice because of the speech in which the petitioner expressed its opinion.

No contention was ever made that anything said in the speech was not true.

The Circuit Court of Appeals, in its opinion, states:

> "As to the purport of Mr. Jacobson's speech, the Trial Examiner reported that he had been impressed particularly by the sincerity of Woodward (the Board's witness). * * * Woodward testified as follows: 'He (Jacobson) didn't say we would lose our jobs by joining the Union. He said we was free to do anything we wanted to do, but the Union couldn't help us none. It was just the same as Frank (Czonstke) told us. It was a bunch of racketeers; that we will get out on the streets and wouldn't have no job or food with it. He didn't say we couldn't do it. We was free to do anything we wanted to do, but he said it was all a racket.

> * * * He didn't say anything about if we signed the contracts we couldn't belong to the Union. We was free to do anything we wanted to do.' "

The Circuit Court of Appeals concludes:

> "This court has said recently that 'Expressions of opinion concerning labor unions, by an employer, * * * may be of such a nature that *their effect is to coerce and intimidate the employees.*"

This is in direct conflict with the case of *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), and the decisions of this Court (*Cantwell* v. *State of Connecticut*, 310 U. S. 296, and *Thornhill* v. *Alabama*, 310 U. S. 88) therein referred to. The Sixth Circuit decided this indentical question and reached the *opposite* conclusions to the Seventh Circuit. The decision contains such a succinct discussion of the issue that it does not seen inappropriate to quote it somewhat fully. The Sixth Circuit said, at page 913:

> "The right of employees to organize for collective bargaining to select representatives of their own choosing, and to unite for concerted action in other respect, is now so clearly recognized as a fundamental right that citation is superfluous. *The right* to hold views upon any and all controversial questions, *to express such views* and to disseminate them to persons who may be interested, *has even more venerable sanction.* This, the Board, in argument and brief, clearly recognizes by the distinction it seeks to draw between the right of Mr. Ford generally to express his labor views, and his right to distribute literature expressing such views, to his employees in the manner adopted. The latter, it holds, had the effect of interference, restraint or coercion, condemned by the statute. We have difficulty in sensing the distinction.

"The right to form opinion is of little value if such opinion may not be expressed, and the right to express it is of little value if it may not be communicated to those immediately concerned. As was said in a recent case involving the application of the Fourteenth Amendment, which embraces the same fundamental concept of liberty as is guaranteed by the First, *Jesse Cantwell, et al.* v. *State of Connecticut,* 310 U. S. 296, announced May 20, 1940:

> 'To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But *the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and the right conduct on the part of the citizens of a democracy.*'

"Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment. The Board, however, urges that these rights are qualified and not absolute, and that there are circumstances under which an expression of view upon labor policies by an employer is within the condemnation of the statute as constituting interference and coercion, and that the present situation, set against a background of publicly declared opposition by Mr. Ford to the unionization of his plant, bring the challenged publications within the definition.

"We do not ignore the view that 'any sort of influence exerted by an employer upon an employee, depending upon his employer for means of livelihood, may very easily become undue in that it will coerce the employee's will in favor of what the employer desires against his

better judgment.' *Virginia Ry. Co.* v. *System Federation No. 40, et al.*, 4 Cir. 84 F. 2 (D) 641. This holds the employer forever suspect and its practical application must necessarily silence him whose opinion may be the best informed, no matter how honestly his views may be entertained, or how truthful may be his observations.

"If the concept that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied.

"That grave responsibility confronts a court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority, or when one liberty collides with another, has already been noted. *Minersville School District* v. *Walter Gobitis*, 60 S. Ct. 1010, 84 L. Ed., announced June 3, 1940; *Cantwell* v. *State of Connecticut, supra.* In the first of the citations a claim to freedom of religious view, assumed to be real and not fanciful, was compelled to give way to the more fundamental concept of a need for preserving the very existence of organized political society, the destruction of the foundations of which would destroy all liberties including that which the court was there urged to preserve.

"By that token, *freedom of speech guaranteed without exception to all, is the more fundamental right here*

involved. 'Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.' Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 327. Without it the very right which the Board seeks to protect by its cease and desist order, the right to organize, to seek converts to unionism and collective bargaining, itself would be of little value.

"As the Supreme Court has recently said in *Thornhill* v. *Alabama*, 310 U. S. 88, 102: 'In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.' Citing *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State of New Jersey, supra.*

"To the argument of the Board that the potentiality of opinion to coerce is to be tested by whether it did in fact coerce, the Supreme Court in the same case makes answer:

> *'It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations* with the business establishment which is the scene of the dispute. *Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.'*

"We have previously observed (*Midland Steel Products Co.* v. *N. L. R. B.*, 6 Cir. 113 Fed (2d) 800, 804, announced June 27, 1940), 'Unless the right of free

speech is enjoyed by employers as well as by employees the guaranty of the First Amendment is futile for it is fundamental that the basic rights guaranteed by the constitution belong equally to every person.' "

The mere fact that the complaining Union, (which had been campaigning since 1935 under various banners) was conducting another campaign at the time of the speech (May 20, 1937), does not vitiate this constitutional privilege.

This Court has always guarded the right of free speech and expression of opinion *"with a jealous eye."* Only when the exercise of this right has resulted in a great deal of bodily, physical *violence* has this Court sanctioned any inroad. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies Inc.,* decided February 10, 1941. Without this factor a sovereign State cannot interfere even indirectly. *American Federation of Labor* v. *Swing,* also decided by this Court on February 10, 1941. Surely in this Democracy, Constitutional privileges apply equally to *all* classes and groups and are not limited to labor organizations.

During the hearings by the Senate Committee on Education and Labor, prior to the passage of the Act, Chairman Walsh stated:

> "I do not think there is anything in this bill to prevent an employer *when his employees * * * are about to organize,* from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a company union, that (he) is violently opposed to so-and-so who is attempting to organize a union." S. 1958, 74th Cong., 1st Sess., at 305 (1935).

Senator Walsh stated that the Senate Committee had stricken the word "influence" from the bill in order to

permit an employer to tell his employees that it would be to their best interests to form a company union, or that he was opposed to a particular union organizer. (Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., at 305 (1935).) The fact that the employer presents the reasons for his conclusions would not make the statement coercive; in fact, it would remove any strain of coercion that might be regarded as being present in the bare expression of a conclusion.

During the course of the debates on the floor of the Senate, it is noteworthy that Senator Walsh stated: "An employee, like an employer, of course, has the right to discuss the merits of any organization. Indeed, Congress could not constitutionally pass a law abridging the freedom of speech. * * * *The bill now under consideration does not enter into those realms of free speech.* * * *" 79 Cong. Rec. 7661 (1935).

Nevertheless, the Circuit Court of Appeals concludes that (a) Petitioner knew of a union campaign among the employees; (b) that it made a speech antagonistic to unions; (c) that it "coerced" employees to sign individual contracts. But the opinion overlooks the controlling factor. Assuming *arguendo* that (a), (b) and (c) were supported by substantial evidence—how were any employees or their rights imposed upon? What were they "forced" to sign—not applications for a dominated collective bargaining agency—not an individual contract whose terms deprived them of anything, but an individual contract which gave the employees the benefit of fair written terms of employment. Thus the opinion appears most inconsistent in stating that individual contracts are legal, but are invalid in this case for *punitive* reasons, due to a speech or "coercion" in the execution of perfectly fair, valid and legal documents.

In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9) the Court said at page 178:

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. *Had Congress attempted so to do it would be in violation of the First Amendment,* U. S. C. A. Const. Amend. 1."

So also in the case of *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2d) 85 (C. C. A. 5), the court did not agree (even in a company dominated union situation) with the findings of the Board attempting to limit the right of free speech of the employer. The Court said at page 89:

> "We do not think that the law, any more than common sense, *would require the employer to stand as a sheep before his shearers dumb, not opening his mouth.* The right of free speech touching his own interests was involved."

CONCLUSION.

This petition in no way seeks to interfere with the right to collective bargaining or union recognition or to forestall the stated purposes of the Act in "impairing the efficiency, safety or operation of the instrumentalities of commerce * * * or causing diminution of employment and wages." The denial of the Constitutional guarantees of freedom of individual contract and freedom of speech would suppress, rather than encourage, such stated policy.

Respectfully submitted,

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